IN THE SUPREME COURT

Appeal from the Court of Appeals
(No. 250539)
Joel P. Hoekstra, Presiding Judge

MARCIA VAN TIL,

Plaintiff-Appellant, **Docket No. 128283**

v.

ENVIRONMENTAL RESOURCES MANAGEMENT, INC., a Pennsylvania Corporation doing business in Michigan and its officers, agents and employees,

Defendants-Appellees.
_____/

APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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I. CIRCUIT COURT SHOULD HAVE CONCURRENT JURISDICTION

Plaintiff-Appellant, Marcia Van Til, agrees with the analysis and arguments raised, and conclusions proposed, by Defendant-Appellee, and the amicus curiae briefs of the Michigan Defense Trial Counsel, Inc. and the Michigan Trial Lawyers Association—that there should be concurrent jurisdiction for the circuit court for this issue.

II. PLAINTIFF-APPELLANT WAS NOT AN EMPLOYEE UNDER *HOSTE/REED*

A. *HOSTE* FACTORS AND THE *HOSTE* TEST

In *Hoste v Shanty Creek Management Inc,* 459 Mich 561, 569; 592 NW2d 360; reh den 460 Mich 1202 (1999), court looked at several issues important to its decision and future analysis of these issues. The Defendant-Appellee ignores the complete framework and the test by which this case should be evaluated. Under the analysis of whether a person is an employee under a "contract of hire," the court noted the minimal authority on what is a contract of hire as compared to one that is contractual but not "of hire". The court initially looked at *Higgins v. Monroe Evening News*, 404 Mich 1, 21, 272 NW2d 537 (1978), in which a plurality determined that a child who was assisting a substitute newspaper carrier when struck by a car was not an employee of the newspaper (insufficient evidence to sustain legal conclusion that boy in service of newspaper under either express or implied contract of hire).

The Court determined that the words "of hire" are important because "not to do so would make virtually everyone, no matter how minimal the exchange of benefits and detriments, eligible to receive workers compensation. "*Id.* at 574.

Under the WDCA as determined in *Hoste*,

- The entire philosophy of WDCA assumes the worker is in a gainful occupation at the time of injury (citing *Betts v. Ann Arbor Public Schools*, 403 Mich 507, 518, 271 NW2d 498 (1978) (Ryan J., dissenting [citation omitted])). *Id.* at 574-75.
- It is a safety net to provide income maintenance for persons who have met misfortune or whose regular income source has been cut off (citing *Franks v. While Pine Copper Div.*, 422 Mich 636, 654, 375 NW2d 715 (1985)). *Id.*, at 575 (Emphasis added).
- It is not enough to be employed pursuant to a "contract." *Id.*, at 575.
- The individual must be employed pursuant to a contract "of hire," where the benefit received by the individual is payment intended as wages, providing benefits to those who have lost a source of income. *Id.*, at 575. (emphasis added).
- There must be payment of wages. *Id.*
- It does not provide benefits to those who can no longer take advantage of a gratuity or privilege that serves merely as an accommodation. *Id.* (emphasis added).

To satisfy the "of hire" requirement, compensation must be payment intended as wages, i.e, **real, palpable and substantial consideration as would be expected to induce a reasonable person to give up the valuable right of a possible claim against the employer in a tort action and as would be expected to be understood as such by the employer."** *Id.*, at 576-77 (emphasis added).

In *Hoste*, the Court determined that, under the above test and the framework of analysis, the ski patroller did not receive payment intended as wages "because they were not substantial enough to induce a reasonable person to forfeit his common-law rights against Shanty Creek." The Court also noted, of significance, that the economic benefits received by the patroller (even over the course of an entire ski season) did not represent a "regular source of income," and that the patroller never claimed any of the economic benefits as wages for purposes of federal income taxes. *Id.*, at 577-78.

The facts of the case of Marcia Van Til show the exact same result:

- Marcia was employed full time elsewhere. (*Appendix* 253a).
- Marcia did not have her regular source of income cut off in this situation. *(Appendix 253a-254a).*
- Marcia herself did not have a "contract" with ERM; rather, her husband had "volunteered" her to help him do his regular job, on Saturday for a few hours, for which he would and did get paid, and which "she did not even think about." *(Appendix 236a).*
- Marcia did not get "payment intended as wages" as her husband did (and he complained about his lack of overtime hours because he had to visit her in the hospital, and ERM paid him, not her, an extra $100 based on issues relating to his, not her, employment and his hours, not hers. (*Appendix* 254a-255a).
- Marcia did not receive any wage from ERM, much less one that represented "a regular source of income." *(Appendix 254a).*

- Marcia did not receive any wages from ERM and as such did not claim any ERM wage for purposes of federal income tax. (*Appendix* 254).[1]
- Neither ERM nor Marcia ever believed or intended that there was a "contract of hire" between them (*Appendix* 236a).
- "Quite simply, [Marcia Van Til] was a 'gratuitous worker,' who was not an 'employee,' but rather an individual assisting another [her husband] with a view toward furthering her own interests [helping her husband do his normal job one Saturday for which he would and did get paid]. It was an accommodation, not employment, known by and agreed to by ERM and its employee, Byron Van Til and could not be construed as to her as "real, palpable, and substantial consideration that a reasonable person would accept in exchange for forgoing the right to bring a tort action against and employer and that would be understood as such by the employer. (*Appendix* 254a).
- The evidence is that Marcia never had such an understanding and the evidence is that "it would not be understood as such by the employer [ERM] (hence, the ERM offer to settle the tort claim and recognition that Marcia and her own health carrier were paying medical expenses). *(Appendix 241a-242a).* See *Joba Construction Company, Inc. v. Burns & Roe Incorporated*, 121 Mich. App. 615, 329 N.W. 760 (1982) (statements to compromise admissible on other issues (i.e., such as what was "understood" by ERM)).

[1] On a prior occasion, Marcia had directly worked for a separate company, Western Michigan Environmental Services, Inc., for which there was an invoice, and a paycheck to her (*Appendix 255a*).

- Marcia "did not receive a regular source of income from the purported employer, but rather simply received a gratuity [her husband was getting paid for his job] that merely served as an accommodation." *Hoste*, at 576.
- Byron Van Til did not have the authority to hire Marcia Van Til, and ERM specifically did not want to hire her—a fact both understood. See *Appendix* at 251a.
- The evidentiary record in this case shows that both Marcia and ERM, individually and collectively, (1) viewed this Saturday situation as an accommodation to Byron to help him do his normal job, (2) viewed this situation not as one "of hire," (3) did not involve payment of wages to Marcia Van Til, (4) and was not understood by Marcia Van Til or ERM as giving up the right to bring a tort action.

The evidence, the framework of the WDCA and principles articulated by this Court in *Hoste*, and the test articulated in *Hoste*, demonstrate that Marcia Van Til was not an employee of ERM. Defendant-Appellee only focuses on part of the test. Even under the "indirect payment" argument, arranged by and between Byron and ERM, does not equate with Marcia Van Til and ERM as having a wage exchange for which tort rights are given up. Such a conclusion/label would ignore the facts, and the *Hoste* analytical framework.

B. *REED V. YACKELL*, 473 Mich 520; 703 NW2d 1 (2005)

Similarly, *Reed* did not depart from the analytical framework of that established in *Hoste*. Factually, *Reed* is different from both the facts of *Hoste* and the facts in this case. First, in *Reed*, there was an agreement by which Herskovitz knew and authorized

Hadley to obtain help and by which that person would in fact get paid and did get paid. Herskovitz testified only that he did not know that the person would be Reed, whom he had fired earlier. Second, the *Reed* Court noted and stated that "[a]ll that is required to establish a contract with Reed is that Hadley had authority to hire . . .and Hadley incontestably had that authority."

However, in this case, Byron Van Til did not have the authority to hire Marcia (*Appendix* at 251a), and ERM specifically did not want to hire Marcia (*Appendix* at 251a and 228a-229a). Marcia Van Til did not get paid wages (*Appendix* at 254a). Byron Van Til got paid wages for doing his normal job and his wages were dependent on whether or not he had enough overtime hours or not; he complained about not getting overtime hours because of the time he had to spend in the hospital tending to his wife. (*Appendix* at 255a). The factual record shows that neither Marcia, her husband Byron, nor ERM ever viewed this as a contract, as a contract "of hire," or that she would be giving up tort rights on this factual record---the very test articulated in *Hoste*.

Again, in *Reed*, there was an agreement and understanding that Hershovitz and Hadley would and did hire and pay wages directly to a third person to deliver products. 473 Mich at 533-34.

In this case, Marcia Van Til and ERM had no such agreement. Byron Van Til did not have the authority to hire anyone, ERM specifically did not want to hire Marcia, and neither Byron nor ERM ever said they would hire her. The evidence is to the contrary. So ERM and Byron Van Til had an agreement by which it would accommodate Byron Van Til and let his wife help him and by which it would pay Byron Van Til, not her, for doing his normal job. What ERM paid Byron was dependent upon his hours (overtime

or not) and whether he complained about his lack of overtime wage because he went to see his wife in the hospital.

It is clear that Marcia did not get paid wages but her husband did, including for the hours she helped him. Such an accommodation, such a "payment" to Byron, does not equate with an affirmative answer to the *Hoste* test question as to Marcia Van Til: was there "real, palpable, and substantial consideration as would be expected to induce a reasonable person to give up the valuable right of a possible claim against the employer in a tort action and as would be expected to be understood as such by the employer." Neither Marcia nor ERM had that agreement or understanding on this factual record. No reasonable person would.

The *Hoste* facts led to a "no" answer to that test question; the *Reed* facts led to a "yes" answer; the Van Til facts lead to a "no" answer to the *Hoste* test.

III. VAN TIL WAS NOT A STATUTORY EMPLOYEE UNDER MCL 418.171

Neither the intent nor the facts of this case support the application of § 171. Marcia Van Til was not an employee under § 161. See *Blanzy v. Brigadier Contractors, Inc.*, 240 Mich App 632, 640; 613 NW2d 391 (2000). There was insufficient record evidence to support such a conclusion, and the evidence is to the contrary, supporting a clearly volunteer situation by which a spouse helped a spouse do his normal job for which he would and did get paid and pursuant to which neither Marcia Van Til nor ERM had any different understanding. She was not an employee of any kind and did not give up, nor be said to give up, tort rights on this factual record.

IV. CONCLUSION AND REQUEST FOR RELIEF

Plaintiff-Appellant Marcia Van Til respectfully requests that this Honorable Court (1) hold that the Circuit Court had jurisdiction or, in the alternative, apply any contrary holding prospectively, (2) hold that Marcia Van Til was not an employee of ERM under the factual record in this case under any theory, and (3) remand the case back to the trial court for continued proceedings.

Respectfully Submitted,

HALPERT, WESTON, WUORI & SAWUSCH, P.C.

Dated: February 16, 2006

By:_____

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